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# Pity the Child: The Age of Delinquency in New York

Merril Sobie\*

In 1899 the State of Illinois established the nation's first juvenile court.<sup>1</sup> Quickly replicated throughout the country, forty-six of the then forty-eight states, including New York, had established separate tribunals devoted to children's cases by 1925.<sup>2</sup> Although virtually every state initially restricted the then novel court's jurisdiction to children less than sixteen years of age,<sup>3</sup> the overwhelming majority increased the juvenile delinquency jurisdictional age in the decades immediately following initial enactment.<sup>4</sup> Today, in forty-eight states, a child who is sixteen years of age will be adjudicated in a juvenile or family court.<sup>5</sup> Only two states, New York and North Carolina, adhere to the original early twentieth century age limitation.<sup>6</sup> The present alignment dates from 2007, when Connecticut became the forty-eighth state to embrace the national norm.<sup>7</sup> The next year, North Carolina established a commission to consider raising the jurisdictional age and recently a relevant legislative committee has introduced and

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1. Juvenile Court Act, 1899 Ill. Laws 131. The Court's jurisdiction included juvenile delinquency and the neglect or abuse of a child by a parent or other person responsible for the child.

2. See PAUL W. TAPPAN, JUVENILE DELINQUENCY 172-73 (1949). A "juvenile delinquent" is a person under a specified age who has committed an act which, if committed by an adult, would be deemed a crime. The two 1925 "holdout" states were Maine and Wyoming—both of which had joined the "juvenile court" bandwagon by the mid-1940s.

3. See *infra* note 15 and accompanying text.

4. See *infra* note 24 and accompanying text.

5. Several states have established family courts, which combine cases involving children, such as delinquency and child neglect, with other intra-family cases, such as domestic violence and divorce.

6. See, e.g., N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2008).

7. CONN. GEN. STAT. § 46b-121 (2009).

approved legislation to increase the jurisdictional age limitation in that state.<sup>8</sup> New York, and only New York, stubbornly maintains the lower age threshold of adult criminal responsibility without any consideration of the alternative.

This paper will first outline the national history of juvenile courts, followed by New York's unique historical experience. It will then discuss the recent Connecticut legislation, the North Carolina efforts, and other twenty-first century developments in juvenile courts' jurisdiction. Finally, the paper will discuss the desirability of similar New York legislation that would raise the jurisdictional age limitation, as well as its possible ramifications.

### A Short National History

On the eve of the twentieth century, Illinois established the first Juvenile Court, a tribunal largely dedicated to the rehabilitation of children who had either engaged in criminal activities, or whose parents had neglected, abused or abandoned them.<sup>9</sup> In one sense, the court was revolutionary—for the first time in Anglo-American legal history a separate court, presided over by specialized “children’s judges,” determined the lives of children. Viewed from a different perspective, the Illinois court was the culmination of juvenile justice developments that had occurred throughout the nineteenth century, including, notably, the adjudication and treatment of youths who were found to have violated the penal law provisions.

The evolution commenced when the New York House of Refuge was chartered in 1824,<sup>10</sup> quickly followed by the establishment of similar institutions in Pennsylvania<sup>11</sup> and Massachusetts.<sup>12</sup> The movement to ameliorate the consequences of a criminal conviction by developing houses of refuge, reform schools, and private religious-based as well as

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8. See S. 1048, 2009-2010 Leg., 1st Sess. (N.C. 2009).

9. Juvenile Court Act, 1899 Ill. Laws 131.

10. Act of Jan. 28, 1826, 1826 N.Y. Laws 18, 18. See also ROBERT M. MENNEL, THORNS AND THISTLES: JUVENILE DELINQUENTS IN THE UNITED STATES, 1825-1940, at 3-4 (1973); *infra* notes 38-39 and accompanying text.

11. See MENNEL, *supra* note 10, at 3-5.

12. See *id.*

non-sectarian residential homes, expanded steadily throughout the century.<sup>13</sup> “By 1890 nearly every state outside of the South had some type of reform school for boys and often a separate institution for girls. . . . [T]hese institutions cared for most of the delinquent children in the United States and for numerous destitute children as well.”<sup>14</sup>

By the late nineteenth century, state legislatures had also established a uniform age limitation of sixteen for placement in a specialized juvenile institution: “In every school, children had to be younger than 16 at the time of commitment; the lower age for commitment varied . . . between 7 and 11.”<sup>15</sup> The national age standard followed several decades in which some states experimented with different age limitations.<sup>16</sup> The reasoning behind the age sixteen national consensus is unclear. Perhaps in the late Victorian era, children above that age were viewed as young adults; or perhaps the jurisdictional age was simply copied from state to state.

The 1899 Illinois Act was quickly replicated throughout the United States. The “watershed” year was 1903, when at least six states enacted virtually identical laws establishing juvenile courts.<sup>17</sup> Not surprisingly, the natural standard of age at the time, sixteen, was almost universally followed. In 1903, for example, California,<sup>18</sup> Pennsylvania,<sup>19</sup> Maryland,<sup>20</sup> Rhode Island,<sup>21</sup> and Indiana<sup>22</sup> all established age sixteen as the jurisdictional cut-off age for their newly-founded juvenile

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13. “For a quarter of a century [1825-1850] the activities of these three institutions defined institutional treatment of juvenile delinquents.” *Id.* at 4.

14. *Id.* at 49.

15. *Id.*

16. *See infra* pp. 1067-76 (discussing New York’s experience).

17. *See* INT’L PRISON COMM’N, CHILDREN’S COURTS IN THE UNITED STATES: THEIR ORIGIN, DEVELOPMENT, AND RESULTS, H.R. REP. NO. 58-701, at app. 165-87 (1904).

18. Act of Feb. 26, 1903, 1903 Cal. Stat. 44 (“This act shall apply only to children under the age of sixteen (16) . . .”). *See also* H.R. REP. NO. 58-701, at app. 165-68.

19. Act of Mar. 10, 1903, 1903 Ind. Acts 516, 518. *See also* H.R. REP. NO. 58-701, at app. 182-85.

20. Act of Apr. 23, 1903, 1903 Pa. Laws 274. *See also* H.R. REP. NO. 58-701, at app. 185-86.

21. Act of Apr. 8, 1904, 1904 Md. Laws 906. *See also* H.R. REP. NO. 58-701, at app. 187.

22. Act of June 15, 1898, 1898 R.I. Acts & Resolves 40. *See also* H.R. REP. NO. 58-701, at app. 179-82.

courts.

Within one decade, twenty-two jurisdictions had established juvenile courts, and by 1925, every state save two had enacted similar legislation.<sup>23</sup> The juvenile court movement had spread like wildfire. As noted, an age limitation of sixteen had characterized the initial legislation. Expanding twentieth century social work and child psychology concepts, coupled with the fact that the new courts were generally perceived as successful, however, influenced legislatures to increase the courts' jurisdictional reach. By 1927, twenty-eight of the forty-eight states had raised the jurisdictional age to eighteen, and most of the remaining twenty states had raised the age limitation to seventeen.<sup>24</sup> At the turn of the twenty-first century, thirty-seven states maintained age eighteen, ten states and the District of Columbia opted for age seventeen, and only three states, Connecticut, North Carolina and New York, remained unchanged at age sixteen. Connecticut joined the ranks of "age eighteen" states in 2008,<sup>25</sup> thus raising the total number to thirty-eight and leaving North Carolina<sup>26</sup> and New York as the only current holdouts adhering to the original, circa 1900, jurisdictional limitation.<sup>27</sup>

Significantly, the jurisdictional "juvenile court age" has almost always been identical, regardless of the type of proceeding.<sup>28</sup> As has been noted, age sixteen was the original common jurisdictional age for juvenile delinquency, status offenses, and child neglect or abuse; today it is eighteen. As noted by one commentator, "[t]he jurisdictional age is generally the same for all children and all forms of conduct."<sup>29</sup> Nationally, the cut-off age for child neglect or abuse is eighteen, while thirty-eight of the fifty states maintain the

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23. TAPPAN, *supra* note 2, at 172.

24. *See generally* HERBERT H. LOU, JUVENILE COURTS IN THE UNITED STATES (1972). Wyoming, the last state to establish a juvenile court, had set the age limitation of age nineteen, but reduced the age to eighteen in 1993. Act of Feb. 16, 1993, 1993 Wyo. Sess. Laws 1, 1-2. *See also* Thomas v. Thomas, 913 P.2d 854, 855 (Wyo. 1996).

25. CONN. GEN. STAT. § 46b-121 (2009).

26. N.C. GEN. STAT. § 7B-1501(7) (2010).

27. North Carolina is presently considering an increase. *See supra* note 8 and accompanying text.

28. *See* SAMUEL M. DAVIS, RIGHTS OF JUVENILES 10 (2d ed. 2009).

29. *Id.* at 10.

same age for juvenile delinquency.<sup>30</sup>

However, the juvenile delinquency age limitation is not absolute. Most states adhere to the general rule, but exempt very violent offenses committed by older adolescents. The exemptions vary, as do the implementation mechanisms. The majority of states provide for “transfer,” whereby juvenile courts determine whether an older adolescent who is accused of committing a violent felony should be treated as a juvenile or, alternatively, should be transferred to adult courts for criminal prosecution.<sup>31</sup> Other states permit a prosecutor to “direct file” in the criminal court, thereby by-passing the juvenile court.<sup>32</sup> Still others exempt certain enumerated offenses committed by older children from juvenile court jurisdiction entirely.<sup>33</sup> Although there is considerable variation, no state in the Union treats a seventeen-year-old murderer as a juvenile delinquent, and most exclude violent assaults and first degree sex offenses. Nonetheless, the limited exceptions prove the rule. The vast majority of American children under the age of eighteen who engage in criminal activities are deemed to be delinquent rather than criminal.<sup>34</sup>

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30. The jurisdictional age limitation is also at least eighteen in several other nations, including Canada, the United Kingdom, China, and France. See Tamar R. Birkhead, *North Carolina, Juvenile Court Jurisdiction, and the Resistance to Reform*, 86 N.C. L. REV. 1443, 1447 (2008). Austria, Germany, and Spain have extended the juvenile court age to twenty-one. See *id.*

31. See DAVIS, *supra* note 28, at 37-48.

32. See *id.*

33. See DAVIS, *supra* note 28, at 30-43 (providing a detailed analysis of the often byzantine procedures).

34. An interesting aspect of juvenile delinquency and the age of the children is the lack of a minimum age, or a very low minimum age, at which a child may be charged with committing a crime and hence be deemed a juvenile delinquent. Only fifteen states maintain a minimum age, ranging from six to ten. See DON CIPRIANI, CHILDREN'S RIGHTS AND THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY: A GLOBAL PERSPECTIVE 117-18 (2009). See, e.g., N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2008) (establishing a minimum age of seven). Almost all developed nations maintain higher minimum ages; for example, in Australia and Britain the minimum age is 10, see CIPRIANI, *supra*, at 188, 220, and in Germany the age is 14, see *id.* at 198.

## New York History

In tandem with the national history, the reform and rehabilitation of New York children who have engaged in criminal activity—and their segregation from adult transgressors—dates from the early nineteenth century. In 1816, two prominent Quaker reformers, Thomas Eddy and John Griscom, established the New York Society for the Prevention of Pauperism for the purpose of advocating and implementing juvenile justice reforms.<sup>35</sup> Vividly portraying the vice of incarcerating children in the adult penitentiary,<sup>36</sup> the Society publicized the plight of children accused of committing non-violent crimes and lobbied extensively for legislative reform.<sup>37</sup> In 1824, the Society succeeded, securing legislation incorporating the Society for the Reformation of Juvenile Delinquents and authorizing the establishment of a New York House of Refuge to rehabilitate juvenile transgressors.<sup>38</sup> Two years later, the state legislature authorized the courts to place with the newly constructed House of Refuge, in lieu of imprisonment, any child convicted of committing a criminal offense anywhere in the state.<sup>39</sup>

Pursuant to the original legislation, placement by a court

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35. See ROBERT S. PICKETT, *HOUSE OF REFUGE, ORIGINS OF JUVENILE REFORM IN NEW YORK STATE 1815-1857*, at 23-30 (1969).

36.

We are sorry to be informed, by the mayor, that since he has administered our criminal jurisprudence, the unpleasant task has devolved on him, of sentencing boys, from twelve to fifteen and seventeen years of age, several times to the penitentiary. . . . [I]f any thing can destroy the ingenuousness and rectitude of youth, and open a road to ruin, it is the polluting society of those veterans in guilt and wickedness, who hold their reign in our prisons of punishment . . . .

MANAGERS OF THE SOC'Y FOR THE PREVENTION OF PAUPERISM IN THE CITY OF NEW YORK, *SECOND ANNUAL REPORT* 34-35 (1820).

37. See MERRIL SOBIE, *THE CREATION OF JUVENILE JUSTICE: A HISTORY OF NEW YORK'S CHILDREN'S LAWS* 26-28 (1987).

38. Act of Mar. 29, 1824, 1824 N.Y. Laws 110.

39. Act of Jan. 28, 1826, 1826 N.Y. Laws 18, 18. Construction of the House of Refuge, located in New York City at Broadway and Twenty-Third Street, an area later developed as Madison Park, was apparently completed by 1826.

was purely discretionary, but in 1830 the legislature empowered the Governor to authorize prison administrators to “. . . convey any convicts who shall be under the age of seventeen years, to the house of refuge in the [C]ity of New-York.”<sup>40</sup> The transition was completed in 1846, when the legislature established the Western House of Refuge near Rochester,<sup>41</sup> and mandated the commitment of convicted children to a house of refuge, thereby precluding imprisonment in a penitentiary:

[T]he courts of criminal jurisdiction of the several counties . . . shall sentence to said house of refuge every male under the age of eighteen years, and every female under the age of seventeen years, who shall be convicted before such court of any felony.<sup>42</sup>

Remarkably, in 1846, New York had prohibited the imprisonment of sixteen and seventeen year old children, an achievement which has eluded this state throughout the twentieth and twenty-first centuries.<sup>43</sup>

The houses of refuge were privately maintained, albeit publicly funded.<sup>44</sup> Governmentally operated facilities were unknown until the twentieth century. The next step in the evolution of children’s laws was the post-civil war development of child protective laws. The first child neglect statute was enacted in 1877.<sup>45</sup> Simultaneously, the State authorized and funded the development of residential child care agencies for

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40. Act of Apr. 16, 1830, 1830 N.Y. Laws 205, 205. In permitting prison administrators to supersede court-ordered imprisonment, the statute appears to constitute a remarkable infringement of judicial discretion.

41. Act of May 8, 1846, 1846 N.Y. Laws 150, 150.

42. *Id.* at 154.

43. *See id.* It applies at least to boys, who then and now account for the overwhelming majority of delinquents. Why the legislature excluded seventeen year old girls is mysterious. It also bears mentioning that the early houses of refuge were strict, locked facilities, akin to the present secure training schools. The goal was to segregate adolescents for purposes of punishment and, hopefully, to rehabilitate the children through isolation and time.

44. *See SOBIE, supra* note 37, at 29.

45. Act of June 6, 1877, 1877 N.Y. Laws 486.

abandoned, neglected, and delinquent children.<sup>46</sup> An 1884 Act mandated that children under the age of sixteen who were convicted of misdemeanors be committed to child care agencies in lieu of commitment to prisons or houses of refuge; while children under the age of sixteen who were convicted of felonies could, in the discretion of the court, be “. . . placed in charge of any suitable person or institution willing to receive him.”<sup>47</sup> The dispositional alternatives, circa 1884, closely resemble the current Family Court Act dispositional provisions which govern juvenile delinquency cases.<sup>48</sup>

The late nineteenth century legislation, unlike the 1846 statute, established age sixteen as the jurisdictional age limitation. Regardless of the possible rationale for excluding sixteen and seventeen-year-old children,<sup>49</sup> New York's firm policy of excluding older adolescents had taken root.

With the turn of the twentieth century, the emphasis shifted from dispositional rules to structural and procedural reform. Following several temporary measures, the New York legislature authorized separate Children's Court parts throughout the state in 1903—precisely the year in which several states<sup>50</sup> were enacting more radical legislation establishing independent juvenile courts:

All cases involving the commitment or trial of children, actually or apparently under the age of sixteen years, for any violation of law, in any court shall be heard and determined by such court, at suitable times to be designated therefore by it, separate and apart from the trial of other criminal cases . . . in a separate courtroom to be known as the children's court . . .

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46. See SOBIE, *supra* note 37, at 60-62.

47. Act of Mar. 21, 1884, 1884 N.Y. Laws 44, 47.

48. N.Y. FAM. CT. ACT § 352.2 (McKinney 2008).

49. Perhaps the legislature thought that the increasing ameliorative provisions were unsuitable for older youths.

50. See *supra* notes 18-22.

51. Act of May 6, 1903, 1903 N.Y. Laws 676, 677. An 1892 predecessor statute mandated that children under the age of sixteen be tried separately from adults, and that the courts maintain separate records for children. See Act of Apr. 5, 1892, 1892 N.Y. Laws 459, 459-60. The progression was from

Two years later, the legislature stipulated that the commission of a crime by a child under the age of sixteen, which was not capital or punishable by life imprisonment, would be deemed a misdemeanor only,<sup>52</sup> and, in 1909, the legislature decriminalized most youthful offenses, formalizing the term “juvenile delinquency”:

A child of more than seven and less than sixteen years of age, who shall commit any act or omission which, if committed by an adult, would be a crime not punishable by death or life imprisonment, shall not be deemed guilty of any crime, but of juvenile delinquency only . . . .<sup>53</sup>

New York thereby joined the large number of states that had substituted a juvenile delinquency finding for a criminal conviction.<sup>54</sup> Following the early twentieth century national norm, the legislature established age sixteen as the jurisdictional ceiling—or, more accurately, continued the late nineteenth century limitation. New York, however, did not at that time establish a separate juvenile court, preferring instead the continuation of its specialized Children’s Court parts.

The Children’s Court parts were nevertheless short lived. Finally bowing to the national movement, New York established the New York State Children’s Court in 1922 for counties outside of New York City,<sup>55</sup> and, two years later, enacted a similar Act to govern the City.<sup>56</sup> For purposes of the Act, a “child” was defined as a person under sixteen years of age,<sup>57</sup> a definition which encompassed delinquency, status offenses and child neglect. In fact, from the late nineteenth century until the establishment of the Family Court in 1962,<sup>58</sup>

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segregated proceedings and records to segregated court parts, i.e., separate courtrooms.

52. Act of May 29, 1905, 1905 N.Y. Laws 1664, 1666.

53. Act of May 25, 1909, 1909 N.Y. Laws 1163, 1163.

54. *See, e.g., supra* notes 18-22 and accompanying text.

55. Act of Apr. 10, 1922, 1922 N.Y. Laws 1259, 1261.

56. Act of Apr. 23, 1924, 1924 N.Y. Laws 493, 494-95.

57. *Id.* at 495.

58. Act of Apr. 24, 1962, 1962 N.Y. Laws 3043.

a span embracing almost a century, the jurisdictional age remained fixed at sixteen. The Court could not entertain a case involving a child above that age, regardless of whether the matter involved a juvenile delinquent, a status offender, or a child who was the victim of child neglect or abuse.

As the twentieth century progressed, adherence to the low threshold criminal age of responsibility age became controversial; reform advocacy intensified as state after state increased the jurisdictional age limitation. A 1931 New York State Crime Commission report criticized the rigid differentiation between the Children's Court and the Criminal Court, and suggested remediation (however non-specific):

The sharp distinction in the criminal law between children over sixteen and those under sixteen is well illustrated in New York City, where the Children's Court is under equity proceedings. A child under sixteen, since 1925, may not be charged with a criminal act. In all breaches of the peace, save for a capital offense, he becomes the ward of the court, rather than its prisoner. He is not arraigned as a criminal . . . nor is he fingerprinted or otherwise classified for purposes of criminal identification. . . . He may not be detained in a jail . . . the services of physicians, psychiatrists and of psychologists are sometimes provided, to assist the judge in determining treatment.

. . . If, however, a child is above the age of sixteen, by as much as a single day, he is subject to all the rigors of the adult courts; of police arrest, of jail detention . . . and, in many instances, of sentence as a felon to a reformatory or state prison where he mingles with hardened adult criminals. . . . The paradox in this situation has been apparent to many for a long while. From a remedial point of view, in light of the abuses to which adolescents are subject, when in contact with the criminal law, a practical solution can probably be arrived at . . . to modify the harshness of the criminal law in its

relation to adolescent offenders.<sup>59</sup>

The 1931 Crime Commission Report, which reads as though it could have been written yesterday, did not influence the legislature and thus remains relevant. Later that decade, “. . . the Joint Legislative Committee on Children’s Court Jurisdiction and Juvenile Delinquency (1937 to 1942) explored whether the juvenile delinquency age should be increased. It found ‘strongly divided opinion’ and recommended that in the absence of ‘any kind of majority sentiment’ of the sort that produced the Children’s Court, the jurisdictional age be maintained at 16.”<sup>60</sup> Revisiting the issue shortly before the establishment of the Family Court, the Temporary Commission on the Courts “. . . concluded that any increase in the juvenile delinquency age in the Children’s courts or any expansion of its jurisdiction to include youthful offenders would be ‘undesirable.’”<sup>61</sup> The continuing efforts of children’s advocates, bolstered by the fact that, by then, virtually every other state had raised the jurisdictional age, could not persuade New York’s legislative leaders.

This brings us to the 1962 Family Court Act. At the 1961 Constitutional Convention, which established the Family Court, the issue of New York’s low age threshold was debated extensively. Finding an absence of a strong consensus, the Convention deferred a decision. The Constitution, drafted at the Convention and enacted by the legislature and the public at large, was accordingly intentionally flexible and incorporated the following non-age specific provision:

The family court shall have jurisdiction over the following classes of actions and proceedings which shall be originated in such family court in the manner provided by law: (1) the protection, treatment, correction and commitment of those minors who are in need of the exercise of the authority of the court because of circumstances of

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59. HARRY M. SHULMAN, *THE YOUTHFUL OFFENDER: A STATISTICAL STUDY OF CRIME AMONG THE 16-20 YEAR AGE GROUP IN NEW YORK CITY* 150-52 (1931).

60. N.Y. JOINT LEGISLATIVE COMM. ON COURT REORGANIZATION, *YOUNG OFFENDERS AND COURT REORGANIZATION* 5 (1963).

61. *Id.*

neglect, delinquency or dependency, as the legislature may determine . . . .<sup>62</sup>

Explaining the Convention's decision to defer a jurisdictional modification and to draft a remarkably flexible and unique constitutional provision,<sup>63</sup> the framers overtly permitted, indeed invited, a change by a simple legislative act, rather than by the cumbersome constitutional amendment process. The official legislative committee comment to the original Family Court Act section states the reasoning:

This section follows existing law in limiting juvenile delinquency to persons under sixteen years of age. *This decision is tentative and subject to change* upon completion of a study of the Youthful Offender Act and the Wayward Minor Law and observation of the functioning of the new court with the program of law guardians established under Article 1. The Joint Legislative Committee on Court Reorganization plans to complete the study and submit legislation in 1963.<sup>64</sup>

The Joint Legislative Committee indeed completed a study in 1963. Its published report, however, came to no firm decision, concluding with the comment: "We look forward to the advice and recommendations of others on these difficult matters."<sup>65</sup> The 1963 report final paragraph included the following bold statement:

Given this constitutional language, this Committee has concluded that the Legislature is under a constitutional mandate to examine again the question of whether the juvenile delinquency age should be changed or other arrangements

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62. N.Y. CONST. art. VI, § 13(b).

63. Other jurisdictional grants are explicit.

64. N.Y. JOINT LEGISLATIVE COMM. ON COURT REORGANIZATION, THE FAMILY COURT ACT REPORT 110 (1962) (emphasis added).

65. N.Y. JOINT LEGISLATIVE COMM. ON COURT REORGANIZATION, *supra* note 60, at 3.

made for dealing with young offenders. In its judgment, the decisions of the past must now be subordinated to the policies of the new constitutional amendment. And these policies require a practical judgment, based on current experiences and realistic estimates, as to how the courts of the unified state court system may be most effectively used to deal with problems of youth.<sup>66</sup>

At that point the legislative history ends. The promise to submit legislation in 1963 was apparently unfulfilled. The constitutional mandate to re-examine the question of whether the juvenile delinquency age should be changed was ignored. The “tentative” 1962 decision has remained in effect for forty-five years, with, astonishingly, no recorded organized effort to seek a modification.

Interestingly, the 1961 Constitutional Convention differentiated delinquency, status offenses, and child neglect for jurisdictional age purposes. As discussed, virtually every state, including New York, had originally limited juvenile court jurisdiction across the board to age sixteen.<sup>67</sup> In subsequent decades, almost every state had raised its age limitation for the three major children’s law causes of action, continuing the principle that a child below a certain threshold age should be treated as a child, regardless of the type of proceeding. New York, while adhering to the principle of a unified age, steadfastly refused to increase the original jurisdictional limitation. For almost one century, from 1865 to 1962, the jurisdictional age for purposes of delinquency, child neglect, and status offenses remained frozen at sixteen.

The 1962 Family Court Act finally raised the jurisdictional age limitation for girls accused of committing status offenses or alleged to be neglected to eighteen, while maintaining age sixteen as the cutoff for similarly situated boys.<sup>68</sup> The modification, which appears to constitute a compromise, broke the, by then, eighty-year policy of parity, which had been a

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66. N.Y. JOINT LEGISLATIVE COMM. ON COURT REORGANIZATION, *supra* note 64, at 6.

67. *See supra* note 39 and accompanying text.

68. Act of Apr. 24, 1962, 1962 N.Y. Laws 3043, 3106.

constant theme both in New York and at the national level. Fifteen years later, the jurisdictional age of neglect was raised to eighteen for boys, inaugurating the present jurisdictional limitation for both genders.<sup>69</sup> In 1972, the New York Court of Appeals had found the gender differentiation for status offenses unconstitutional,<sup>70</sup> effectively restoring age sixteen for that cause of action, and prompting the 1977 statutory change for child neglect cases.<sup>71</sup> Finally, in 2001 the legislature raised the status offense age to eighteen for both sexes.<sup>72</sup> Ironically, the legislative findings underpinning the 2001 amendment cite “. . . a recognition that teens under the age of 18 need supervision, guidance and support to grow and mature into responsible adults.”<sup>73</sup> The findings could just as readily justify raising the juvenile delinquency age limitation.

Today, New York maintains an age limitation of eighteen for child protective actions (neglect or abuse) and for status offense actions.<sup>74</sup> In that respect, the state adheres to the national norm. However, this state has thus far failed to similarly adjust delinquency jurisdiction in accord with the national consensus. In most states, a child remains a child until the age of emancipation, regardless of the issue.<sup>75</sup> In New York, a child remains a child until the age of emancipation, unless and until he is accused of committing a crime.

### Twenty-First Century Revelations

The perception of adolescent criminality has been significantly altered in the past decade, moving from a “get tough on child predators” paradigm to one which emphasizes the diminished responsibility of children. Several factors have contributed to the ameliorative trend: a) a major decrease in the juvenile crime rate, and an even more pronounced diminution in the juvenile violent crime rate; b) studies

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69. Act of Aug. 1, 1977, 1977 N.Y. Laws 1.

70. *See* A. v. City of New York, 31 N.Y.2d 83, 89 (1972).

71. Act of Aug. 1, 1977, 1977 N.Y. Laws 1.

72. Act of Oct. 29, 2001, 2001 N.Y. Laws 2777, 2824.

73. *Id.*

74. N.Y. FAM. CT. ACT §§ 712, 1012 (McKinney 2009).

75. Although that is compromised by waiver and transfer provisions in several states.

showing conclusively that treating youths as adults, and thereby incarcerating them in adult penal institutions—as opposed to juvenile facilities—dramatically increases recidivism; and c) research proving that older adolescents are not as fully developed neurologically as adults and, as every parent knows innately, their ability to exercise sound judgment or control impulsive behavior is accordingly compromised. This section will present a summary of these developments.

The late twentieth century witnessed a major upsurge of criminality, both adult and juvenile. Between 1965 and 1980, the juvenile violent crime and homicide rates doubled and, after a brief interlude, continued to increase until 1994.<sup>76</sup> Not surprisingly, the legislative response was to selectively increase the number of children prosecuted as adults.<sup>77</sup> Except Wyoming, however, no state raised the general juvenile delinquency age limitation.<sup>78</sup> By the end of the century, the upsurge had reversed, and the juvenile crime rate plummeted. Between 1994 and 2003, the juvenile arrest rate for violent crimes decreased thirty-two percent<sup>79</sup> and the trend has continued, albeit at a less dramatic rate.

Thus, while in 1994 the arrest rate of children (ages 10-17) for violent crimes was over 500 per 100,000 (or, approximately one-half of one percent), by 2007 the violent crime arrest rate had decreased to slightly less than 300 per 100,000 (or, an arrest rate of one-third of one percent).<sup>80</sup> The arrest rate for murder was even more pronounced, falling from 14 per 100,000 children to 4 per 100,000.<sup>81</sup> The decrease in the property crime index was equally dramatic, from 2,500 per 100,000 children in 1994 (2.5%) to 1,250 per 100,000 children in 2007 (1.25%).<sup>82</sup>

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76. See BARRY C. FELD, *JUVENILE JUSTICE ADMINISTRATION IN A NUTSHELL* 28-30 (2d ed. 2009).

77. See *id.* at 30, chs. 6, 8.

78. Technically an exception, Wyoming reduced the age limitation from nineteen to the national norm of eighteen. See WYO. STAT. ANN. § 14-6-201 (2008).

79. See FELD, *supra* note 76, at 29.

80. See Charles Puzzanchera, *Juvenile Arrests 2008*, JUV. JUST. BULL. (Office of Juvenile Justice & Delinquency Prevention, U.S. Dep't of Justice, Wash., D.C.), Dec. 2009, at 1, 5, available at <http://www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf>.

81. *Id.* at 6.

82. *Id.* at 5.

Only half as many children committed property crimes in 2007 as did thirteen years earlier.<sup>83</sup> The available contemporary statistics also highlight the petty nature of juvenile crime, although that is not a new development. For example, in 2007, 200,300 children were arrested for larceny, 111,800 for vandalism, and 201,200 for disorderly conduct.<sup>84</sup> In contrast, only 34,490 were arrested for robbery, 7,200 for arson, and 3,580 for forcible rape.<sup>85</sup>

The recent decrease in adolescent violent crime is reflected not only in the overall delinquency rate, but also in the number of New York children who are detained or placed in training schools (a violent youth is far more likely to be detained pending disposition and subsequently placed upon a finding of delinquency). A “snapshot” study by the Vera Institute of Justice found that in just two years, from 2004 to 2006, the number of alleged juvenile delinquents who were securely detained decreased by approximately one-third, from 2,985 to 2,046 (excluding New York City).<sup>86</sup> During the same period, the number of children placed by the Family Court with Office of Children and Family Services Training Schools statewide decreased from 2,234 to 1,777.<sup>87</sup> The downward spiral continues: in 2008 only 813 children were placed by the Court in state training schools; the number of placements plummeted approximately sixty percent in four years.<sup>88</sup> Nationally and locally, the juvenile crime rate has significantly decreased while at least in New York, the number of children

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83. *Id.*

84. *See id.* at 3.

85. *See id.* The number of arrests presents a somewhat inflated picture in light of the fact that arrests do not necessarily resort in prosecutions and may evidence a degree of overcharging; other cases were undoubtedly dismissed after the filing of an accusatory instrument.

86. VERA INST. OF JUSTICE, WIDENING THE LENS 2008: A PANORAMIC VIEW OF JUVENILE JUSTICE IN NEW YORK STATE 8 (2008), *available at* [http://www.vera.org/download?file=1810/VERA%2BReport1\\_6\\_09.pdf](http://www.vera.org/download?file=1810/VERA%2BReport1_6_09.pdf). The statistics cited above tallied the number of detentions, including children, who had been detained more than once; the number of different children detained in 2006 totaled 1,719. *Id.* at 8.

87. *Id.* at 17.

88. *See Admissions of Juvenile Delinquents and Juvenile Offenders to Institutions 1998-2008*, CHILD WELFARE WATCH (Ctr. for an Urban Future, New York, N.Y.), Fall 2009, at 12, 12. In 2004-2008, the number of delinquent youths placed in privately-operated residential non-secure programs remained constant, at approximately 800 per year. *Id.*

incarcerated in facilities for juvenile delinquents has decreased dramatically.

Recidivism is perhaps the most salient gauge of the juvenile justice system's effectiveness—in fact, a more accurate measure than the juvenile crime rate. After all, a child of seventeen is likely to be back on the streets when in his twenties, regardless of the crime of conviction or the adjudicating court. Surprisingly, until recently there were few, if any, studies that compared children who were treated as delinquents in family and juvenile courts—and accordingly placed in juvenile facilities—with their similar brethren, who were prosecuted as adults—and accordingly serve time in adult jails and penitentiaries. That empirical void has now been filled, and the studies show conclusively that children who are incarcerated with adults have significantly higher recidivism rates, even when they have committed the same crimes in similar circumstances.<sup>89</sup>

Perhaps the most interesting recidivism study—and the most relevant to this article—compared recidivism rates in New York and New Jersey. New York maintains a juvenile delinquency age limitation of sixteen; New Jersey, however, adheres to the national norm of eighteen.<sup>90</sup> Hence, a sixteen or seventeen-year-old who commits an offense will be adjudicated in a juvenile court in New Jersey, while his New York counterpart will be adjudicated and sentenced as an adult. The study found that children prosecuted in New York were 85 percent more likely to be re-arrested for violent crimes, and 44 percent more likely to be re-arrested for felony property crimes, than similarly situated New Jersey teenagers.<sup>91</sup> Thus, New York's approach is clearly counter-productive.

The final development is the recent neurological and

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89. See generally, e.g., Andrea McGowan et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles From the Juvenile Justice System to the Adult System: A Systematic Review*, 32 AM. J. PREVENTATIVE MED. 7 (Supp. Apr. 2007); Lawrence Winner et al., *The Transfer of Juveniles to Criminal Court: Reexamining Recidivism Over the Long Term*, 43 CRIME & DELINQ. 548 (1997).

90. N.J. STAT. ANN. § 2A:4A-23 (West 2010).

91. See JOHN D. AND CATHERINE T. MACARTHUR FOUND, *THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE ADULT CRIMINAL COURT* (Jeffrey Fagan & Franklin E Zimring eds., 2006), in Birkhead, *supra* note 30, at 1461.

psychological studies relating to adolescent brain development. The news on that front is not entirely new. From Aristotle to post-Freudian psychiatrists, experts have anecdotally documented and discussed adolescent impulsive, experimental, peer-driven, and immature or inappropriate behavior.<sup>92</sup> What is new is the neurological research, including brain scanning technology, that has provided scientific proof of the age-old assumptions and experiences.<sup>93</sup>

Of perhaps even greater significance is the influence of the high tech findings on juvenile justice, doctrinally and in practice, including the concept of “diminished responsibility,” i.e., the principle that children and, to a lesser extent, young adults, should not be held as accountable as adults for their criminal activities.

This short paper is not the place to outline, much less critique, the available literature. Instead, I will rely solely on the United States Supreme Court, and its landmark 2005 case of *Roper v. Simmons*, which determined that persons under the age of eighteen could not be punished capitally.<sup>94</sup> In reaching that conclusion, the Court made the following lengthy observations:

First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” *Johnson v. Texas*, 509 U.S. 350, 367 (1993); *see also* *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (“Even the normal 16-year old customarily lacks the maturity of an adult”). It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” J.

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92. See FRANKLIN E. ZIMRING, *AMERICAN JUVENILE JUSTICE* 49-69 (2005) (providing an excellent contemporary description of adolescent psychology and its impact on juvenile criminality).

93. See *infra* notes 94-95 and accompanying text.

94. 543 U.S. 551 (2005).

Arnett, *Reckless Behavior in Adolescents: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings*, 455 U.S. at 115 (“[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage”). This is explained in part by the prevailing circumstances that juveniles have less control, or less experience with control, over their own environment. See Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003) (“[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a setting”).

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968).

These differences render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater

claim than adults to be forgiven for failing to escape negative influences in their whole environment. *See* *Stanford v. Kentucky*, 492 U.S. 361, 395 (1989) (Brennan J., dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievable depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside." *Johnson*, 509 U.S. at 368; *see also* *Steinberg & Scott, supra*, at 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").<sup>95</sup>

Whether the crime is murder, as it was in *Roper*, or petit larceny, the most common crime committed by juveniles, the Supreme Court's analysis remains equally valid. Holding sixteen and seventeen-year-old children as criminally accountable as adults is poor policy, a conclusion that has been validated and accepted scientifically and jurisprudently.

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95. *Id.* at 569-70 (some internal citations omitted) (some internal citations formatted from original).

## Contemporary Developments and Age

The contemporary sociological, psychological, and neurological studies, coupled with the juvenile crime rate reversal (from “crime wave” proportions to an almost historical post-World War II low), has resulted in a broad reconsideration of juvenile justice policy and practice. *Roper*, where the Supreme Court reversed its holding in *Stanford v. Kentucky*,<sup>96</sup> a case decided only sixteen years earlier, is one example of the new paradigm. In the past few years, the application of harsh criminal sanctions to juveniles, such as life imprisonment without the possibility of parole, have been questioned.<sup>97</sup> To be sure, the dominant late-twentieth century “get tough” attitude has not vanished, but has at least been partially eclipsed by the growing movement toward balance and amelioration.

Revisiting the general jurisdictional age limitation is an integral, albeit limited, feature of the national movement: integral because it is central to juvenile justice, but limited because only three states subscribed to the lower threshold at the beginning of this century. One of those three states, Connecticut, has since raised the jurisdictional age to eighteen.<sup>98</sup> A second, North Carolina, has embarked on a similar path: bills to raise the age limitation to eighteen have been approved by the North Carolina House Judiciary Committee and are pending before the state Senate’s Judiciary Committee.<sup>99</sup> That leaves New York in isolation, as the only state in the Union which, to this date, has yet to take any legislative action.

The Connecticut law that raised the State’s jurisdictional age from sixteen to eighteen was enacted in 2001, and has become fully effective as of 2010.<sup>100</sup> The recidivism studies and the decreasing crime rate were helpful to the Connecticut

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96. 492 U.S. 361 (1989).

97. For example, the American Bar Association has opposed continuation of life without the possibility of parole.

98. CONN. GEN. STAT. § 46b-121 (2009).

99. See S. 1048, 2009-2010 Leg., 1st Sess. (N.C. 2009). North Carolina has also established a task force to study and report on this issue. See North Carolina Department of Juvenile Justice and Delinquency Prevention, <http://www.juvjus.state.nc.us/youthAccountabilityTaskForce/taskForce.html> (last visited Mar. 24, 2010). A final report is due in January 2011.

100. CONN. GEN. STAT. § 46b-121.

movement. The key factor, however, was the prevalence, as publicized by the reform advocates, of non-serious offenses committed by children, as opposed to the commission of violent offenses.<sup>101</sup> In every jurisdiction, the large majority of the crimes which children commit are property offenses, such as larceny, automobile theft, and vandalism, or, to a lesser extent, personal crimes such as misdemeanor assault. For example, in the United States, 468,200 persons under the age of eighteen were arrested for larceny and 145,300 were charged with vandalism in 1992, while only 45,700 were charged with robbery, and only 3,300 were charged with murder or non-negligent manslaughter.<sup>102</sup> When the Connecticut legislative sponsors excluded the relatively small number of violent felonies from the proposed legislation (thus retaining criminal jurisdiction for those offenses), there was little perceived justification to continue general criminal jurisdiction.<sup>103</sup> The relevant Connecticut Joint Legislative Committee Report explained the decision:

Each year, 10,000 Connecticut children can be expected to go through the [then] adult system. About two of them will have killed someone. We believe it is better to design a system for the 10,000 than for the two. There will still be provision to move violent youths to the adult system – we are not talking about giving anyone a pass for serious crimes. The vast majority of minors, however, could be better held accountable in the juvenile system, where rehabilitative services have been proven to put youths back on the track, rather than the adult system, an ideal environment to create career criminals. The experience of other states proves

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101. See *infra* note 104 and accompanying text.

102. OFF. OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEPT OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 100 (1995).

103. The Connecticut Act grants unlimited initial jurisdiction to the juvenile court, but for the most violent offenses, mandates transfer to the criminal courts upon application of the prosecutor. See CONN. GEN. STAT. § 46b-121.

this.<sup>104</sup>

North Carolina has not yet followed Connecticut, or at least has not followed quickly. However, a considerable movement for change has developed.<sup>105</sup> A bill to raise the jurisdictional age limitation has been introduced in the North Carolina legislature, approved by its House Judiciary Committee, and forwarded to the Appropriations Committee.<sup>106</sup> There appears to be considerable momentum, although only time will tell whether North Carolina will join the forty-eight states and the District of Columbia where the jurisdictional age limitation is greater than sixteen, and leave New York as the last American holdout.<sup>107</sup>

### Implementation and Ramifications

Adjusting the jurisdictional age limitation would be a relatively simple exercise. In fact, the feat may be accomplished through a one-page bill amending a few sections in the Family Court Act and Penal Law. The New York State Constitution was intentionally drafted to permit just such a simple amending procedure. However, it is unlikely that the legislature would apply the precise existing juvenile justice structure to the older adolescent population, and it is questionable whether even the proponents of change would opt for strict equalization. Moreover, an amendment would entail significant ramifications to the judicial and executive branches of government, both state and local, which the bill would need to address.

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104. H. Ted Rubin, *Juvenile or Adult Jurisdiction? Age Changes in the States*, JUV. JUST. UPDATE, Dec./Jan. 2008, at 1, 2 (quoting CONN. JUVENILE JURISDICTION & IMPLEMENTATION COMM.).

105. See, e.g., Birkhead, *supra* note 30, at 1493-94.

106. H.R. 1414 (N.C. 2009).

107. Illinois has historically maintained age seventeen as the cutoff. Recently, however, there has been an interesting compromise. The state has raised the jurisdictional age to eighteen for misdemeanors and has established a task force to consider adding felony arrests. See Jeff Long, *Illinois Increases Juvenile Court Age Cutoff to 17*, CHI. TRIB., Mar. 12, 2010, <http://www.chicagotribune.com/news/local/chicago/ct-x-juvenile-court-20100312,0,2576685.story>.

The most important decision, assuming an increase in the general age jurisdictional limitation, is where to draw the line. No state defines juvenile delinquency to include every criminal act committed by every person under the age of eighteen (or seventeen). The universal exclusions include homicide, attempted murder, aggravated assault,<sup>108</sup> and first degree sexual offenses.<sup>109</sup> Beyond the list of obvious “horror” crimes, there is a striking lack of a consensus regarding other violent offenses committed by the upper juvenile age group, which should fall under the jurisdiction of the juvenile courts. As has been noted, some states permit “direct filing” in criminal court of the more egregious violent charges, such as robbery; others preclude criminal prosecution; while still others permit “transfer” of such cases in the discretion of the juvenile court or in the discretion of the prosecutorial authority.<sup>110</sup>

Given a blank slate, New York would have divergent models to choose from. This state has, however, already opted for a modified “direct file” system for children under the age of sixteen: the Juvenile Offender Act, enacted in 1978, encompasses children over the age of fourteen charged with specified violent felonies, including robbery (first and second degree) and first degree sexual offenses, as well as children over the age of thirteen charged with murder.<sup>111</sup> Such cases are initially filed in the criminal courts but are later “removed” to the Family Court once the child is convicted of a lesser crime, or “removed” for other reasons in the discretion of the court (usually with the consent of the relevant District Attorney).<sup>112</sup>

It would be impractical, if not unthinkable, to treat children above the age of sixteen who have committed a juvenile offense more leniently than their younger brethren. Ergo, the definition of a “juvenile offender” would undoubtedly be amended to encompass persons under the age of eighteen. A more difficult question is whether to expand the list with additional violent felonies, i.e., to augment the definition for

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108. Defined as first degree assault in New York. *See* N.Y. PENAL LAW § 120.10 (McKinney 2009).

109. *See, e.g.*, Davis, *supra* note 28, at 37-48.

110. *See id.*

111. *See* Act of July 20, 1978, 1978 N.Y. Laws 1, 2.

112. *Id.*

the older age group.<sup>113</sup> (A juvenile offender would hence be a child over the age of thirteen, or fourteen, or sixteen, depending upon the crime charged.) One further complication is the unique sentencing structure for juvenile offenders, which is more stringent than a delinquency disposition but less stringent than an adult sentence.<sup>114</sup> The question remains whether the sentencing structure should be altered for older adolescents. Moreover, the complicated procedures governing the transfer of juvenile offenders from state training schools to prisons would also need to be amended if the jurisdictional age was increased.<sup>115</sup>

Another issue in raising the jurisdictional age limitation concerns prosecution. In virtually every other state, the criminal court prosecutorial authority also prosecutes juvenile delinquency cases in the juvenile or family court.<sup>116</sup> This is not so in New York. Prosecution<sup>117</sup> is almost always the responsibility of a civil authority, namely the local County Attorney or Corporation Counsel.<sup>118</sup> However, for the more serious violent felony cases, known as “designated felonies,” the District Attorney may enter into an agreement with the civil authority whereby the District Attorney assumes prosecution<sup>119</sup> and, of course, would then prosecute the juvenile offender in the criminal courts. New York could choose to continue the present pattern, which would shift the bulk of cases involving fifteen and sixteen-year-old children to the county attorneys and corporation counsels, or it could alter the present

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113. A “juvenile offender” would hence need to be defined as a child over the age of thirteen, or fourteen, or sixteen, depending upon the crime charged.

114. See N.Y. PENAL LAW § 70.05 (McKinney 2009).

115. At the other end of the crime spectrum, virtually every state excludes traffic offenses from juvenile court jurisdiction. That exclusion would also be automatic in New York, which, under the Family Court Act, a “juvenile delinquent” is defined as a person under the specified age who commits a “crime,” thereby excluding all offenses less than misdemeanors, including traffic infractions, such as running a red light or speeding. See N.Y. FAM. CT. ACT § 301.2(1) (McKinney 2008).

116. H. Ted Rubin, *Prosecutors in Juvenile Court: Compatibility and Conflict*, JUV. JUST. UPDATE, Feb./Mar. 2008, at 1.

117. The Family Court Act uses the term “presentment.”

118. See N.Y. FAM. CT. ACT § 254.

119. See *id.* § 254-a.

arrangement by adopting a bifurcated prosecutorial system.<sup>120</sup>

The impact of expanded juvenile delinquency jurisdiction on the judiciary is obvious, although the precise weight is difficult to gauge. Close to half of the arrests of all children under the age of eighteen involve youngsters who are sixteen or seventeen.<sup>121</sup> Hence, the Family Court's juvenile delinquency caseload could potentially almost double. However, the more serious violent cases would likely remain within the criminal court structure, and those cases place a greater demand on judicial resources than the law seriously cares. The caseload allocation between criminal and family courts would depend upon where the Legislature drew the line between "juvenile delinquents" and "adults" for criminal purposes. Regardless of the allocation, however, the Family Court and the agencies that service the Court, would witness a major upsurge in juvenile delinquency cases—cases that constitute approximately ten percent of the overall caseload.<sup>122</sup> That increase would be balanced by a commensurate decrease in the criminal courts' caseload.

An adjustment to the age limitation would also place an increased burden on post-dispositional resources. At present, an older adolescent offender is detained in local jails and, when incarcerated, is housed in local jails (for misdemeanors) or in State Department of Correctional prisons (for felonies). Children under the age of sixteen are detained in local detention facilities, and, when deprived of their freedom, are housed mainly in state training schools operated by the State Office of Children and Family Services, or alternatively, in private residential programs.<sup>123</sup> Adjusting the age would

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120. A bifurcated prosecutorial system could involve an arrangement whereby one prosecutorial authority handles cases when the respondent is under the age of sixteen at the time of the commission of the offense, while a different authority prosecutes those individuals over the age of sixteen. However, this bifurcated system would create a complicated scheme, particularly if a case included co-respondents of different ages.

121. See *supra* notes 84-85 and accompanying text.

122. Surprisingly, in recent years the Legislature has significantly increased the Family Court's jurisdiction without a commensurate increase in its resources. Examples include raising the age of persons in need of supervision, N.Y. FAM. CT. ACT § 712 (McKinney 2009) (raising the age from sixteen to eighteen), and requiring frequent permanency hearings when a child is in placement, see *id.* § 1089.

123. See *id.* § 353.3 (McKinney 2008).

consequently increase the training school and detention center population, and decrease the jail and prison population, although the exact re-allocation would, again, depend upon where the Legislature “drew the line.” Given significantly decreasing crime rates and a renewed emphasis on community based services, Office of Children and Family Service facilities are under-populated, and the agency has consequently had to close residential facilities.<sup>124</sup> Hence, the system could accommodate an increased population. Some physical expansion might nevertheless be needed, and operating costs would surely increase. Non-secure detention is available in every county in the State, but would probably need augmentation. Secure detention poses a more difficult problem. The number of facilities is very small and they are often far removed from a given geographic area. Even a limited expansion would pose financial and logistical problems.

Finally, I hazard a very rough generalization of the overall operational fiscal repercussions. The number of arrests

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124. See Press Release, N.Y. Office of Children & Family Servs. (“OCFS”), New York State Office of Children and Family Services Accelerating Transformation of State Juvenile Justice System (Jan. 11, 2008), *available at* [http://www.ocfs.state.ny.us/main/news/2008/2008\\_01\\_11\\_juvenilejusticetransformation.asp](http://www.ocfs.state.ny.us/main/news/2008/2008_01_11_juvenilejusticetransformation.asp) (stating that the Commissioner of OCFS “announced the closing of six underutilized residential facilities” and the partial closing of several additional facilities). The OCFS residential facilities or training schools are not problem-free. In fact, the United States Department of Justice has recently cited the agency for physically abusing the children in its custody, maintaining an inadequate monitoring system, overusing psychotropic drugs, and lacking sufficient mental health staff. See Letter from Loretta King, Acting Assistant Att’y Gen., Civil Rights Div., U.S. Dep’t of Justice, to Hon. David A. Paterson, N.Y. Governor (Aug. 8, 2009), *available at* [http://www.justice.gov/crt/split/documents/NY\\_juvenile\\_facilities\\_findlet\\_08-14-2009.pdf](http://www.justice.gov/crt/split/documents/NY_juvenile_facilities_findlet_08-14-2009.pdf). OCFS is attempting to address the sobering findings and will presumably remedy or at least partially remedy the situation. In any event, children who are placed in state custody enjoy greater constitutional rights than adult prisoners. See, e.g., *Gary H. v. Hegstrom*, 831 F.2d 1430, 1437 n.3 (9th Cir. 1987) (Ferguson, J., concurring) (“The ‘evolving standards of decency’ against which courts evaluate the constitutionality of the conditions certainly provide greater protection for juveniles than for adults.”). The sixteen-year-old incarcerated in a local or state prison faces even worse conditions, and of course the great majority of youngsters who are found guilty of engaging in criminal conduct are not placed or incarcerated. The jurisdictional age limitation and the conditions of confinement are distinct and separate issues.

and cases would not change to any significant extent and the total governmental expenditures should accordingly stay roughly comparable to the contemporary system. Raising the jurisdictional age, however, would trigger a significant financial reallocation. Misdemeanor cases, which constitute a large majority of the proceedings, would move from the locally funded city and justice courts to the state funded Family Court. A substantial number of felony proceedings would likewise be heard in Family Court, as opposed to the County or Supreme Courts. Defense costs would be borne by the State, which funds the representation of children in Family Court, as opposed to the counties, which largely fund criminal defense representation. Prosecution services are primarily county funded in both Family and Criminal Courts, and should therefore remain relatively constant. Detention and incarceration of adults convicted of misdemeanor violations are primarily local or county charges, whereas the detention and custodial placement of children are State charges. In sum, unless the current fiscal rules and policies are modified, raising the jurisdictional age would result in significant State fiscal obligations—judicial and executive—with a commensurate decrease of the local funding burden. The financial reallocations would be relatively gradual, since full implementation would require a four or five year time span.

### Conclusion

Juvenile and Family Courts were established throughout the country at the beginning of the twentieth century. Originally, their jurisdictional scope was limited to children under the age of sixteen, but by the end of the twentieth century, virtually every state had expanded jurisdiction to encompass sixteen and seventeen-year-old children; in fact, the progression was largely completed by 1940. New York has followed the national norm by raising, albeit belatedly, the jurisdictional age for every cause of action, save juvenile delinquency. For delinquency, and only for delinquency, this State has adhered to the original, circa 1900, restriction. A major endeavor to raise New York's jurisdictional age was mounted in the 1930s, but it fell short. Subsequently, a similar movement almost succeeded at the 1961 State Constitutional

Convention, which established the Family Court; but when the dust settled, New York maintained the age restriction as a “temporary” measure pending a promised legislative initiative. The “temporary” compromise has remained in effect for forty-eight years.

The reasons for the national age-eighteen consensus are not difficult to decipher. The overwhelming percentage of criminal acts committed by adolescents are minor, and predominately include larceny, vandalism, auto theft, and misdemeanor assault. The recidivism rate is low—nationally, approximately two-thirds of all juveniles who are arrested never re-offend. Ergo, it makes little sense to subject these children to criminal prosecution, penalties, and records, as opposed to juvenile court remedies, including when appropriate, placement in a residential facility. For the small minority of children who have committed violent felony acts, every State provides a mechanism to shift prosecution to the adult criminal court. The public is thereby protected, while most children are appropriately adjudicated in a more ameliorative environment, one which focuses on the child’s best interests and maintains a high degree of confidentiality. The national consensus has been recently affirmed by several developments, including a significant decrease in the juvenile crime rate, studies proving that children who are prosecuted as adults—as in New York—have far higher recidivism rates, and twenty-first century neurological research proving the diminished judgment capacity, competency, and hence, responsibility, of adolescents.

There is no reason why New York cannot, or should not, join the rest of the nation. We would, after all, be the penultimate State or, perhaps, the very last State. The public benefits are manifest, as are the benefits to New York’s children. The only missing element, at least thus far, has been the lack of political will, both at the community and the legislative levels. It is surely time to commence a public and legislative dialogue, and to seriously consider the advantages of increasing the jurisdictional age limitation.